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IN THE

Supreme Court of the United States

October Term, 1968

No. 788

IN THE MATTER OF THE APPLICATION OF
KNICKERBOCKER INSURANCE COMPANY,
Petitioner,

for an order Staying the Arbitration Commenced by
PATRICIA FAISON and CAROLYN E. RAINEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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KNICKERBOCKER INSURANCE COMPANY,

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for an order Staying the Arbitration Commenced by PATRICIA FAISON and CAROLYN E. RAINEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Supreme Court of the United States:

Knickerbocker Insurance Company, the petitioner herein, hereby prays for a writ of certiorari to review the final order of the Court of Appeals of the State of New York, made on October 10, 1968.

Citations to Opinions Below

The memorandum opinion of the Supreme Court of the State of New York, County of New York, was not officially reported and is printed herein in Appendix "B", *infra,* p. 17. The order of said Supreme Court was affirmed, without opinion, by the Appellate Division of the Supreme Court, First Judicial Department, which Court granted petitioner's motion seeking leave to appeal from the order of unanimous affirmance to the Court of Appeals of the State of New York.

The opinion of the Court of Appeals of the State of New York, affirming the order appealed from is reported in 22 N. Y. 2d 554 and is printed in Appendix "B", *infra*, pp. 18-22. The said Court of Appeals did not render any opinion upon denying reargument.

Jurisdiction

The order of the Court of Appeals of the State of New York, affirming the unanimous order of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, was made on July 2, 1968, and is printed in Appendix "B", *infra*, pp. 23-25. A motion for reargument was made within the time limited therefor under the rules of the Court of Appeals, and the order denying reargument was made on October 10, 1968, and is printed in Appendix "B", *infra*, p. 26. Thereby, the said order of July 2, 1968 was rendered final for the purposes of this petition on October 10, 1968.

No application has been made for an order extending the time within which to petition for a writ of certiorari.

The jurisdiction of this Court is invoked under Title 28, U. S. C., section 1257 (3), on the ground that a final order in a special proceeding was made after a decision of the Court of Appeals of the State of New York which order is repugnant to a right set up or claimed under the *Constitution of the United States*, Article 1, §10, clause 1.

The Questions Presented

1. Whether the Court of Appeals of the State of New York impaired petitioner's obligation of contract with respondents under the clear and unambiguous language of the uninsured motorist endorsement when it announced a construction of that contract contrary to the ordinary language of such endorsement.

2. Whether Article 17-A of the *Insurance Law of the State of New York* has operated to impair the obligations of an insurance endorsement, the form of which was prescribed under authority of §167, subd. 2-a, of said *Insurance Law.*

3. Whether petitioner's obligation of contract under the "New York Accident Indemnification Endorsement" was impaired by a statute of the State of New York.

The Statutes Involved

The statutory provisions involved are Article 1, §10, clause 1, of the *Constitution of the United States* and §§167, subd. 2-a, 600, 601, subds. b and i, and 608, subd. (c) of the *Insurance Law of the State of New York,* printed in Appendix "A", *infra,* pp. 13-16.

The Facts Necessary to a Consideration of the Question Presented

On January 3, 1966, petitioner issued a "Family Combination Policy" to one Dennis Coleman (7) * containing among its riders a "New York Automobile Accident Indemnification Endorsement" which provided, *inter alia*:

> "I. Damages for Bodily Injury Caused by Uninsured Automobiles: The company will pay all sums which the insured * * * shall be legally entitled to recover from the owner or operator of an uninsured automobile because of bodily injury * * * sustained by the insured, caused by an accident arising out of the ownership, maintenance or use of such uninsured automobile; provided for the purposes of this en-

* Numbers in parentheses refer to page numbers in Record on Appeal in New York Court of Appeals.

dorsement, determination as to whether the insured * * * is legally entitled to recover such damages * * * shall be made by agreement between the insured * * * and company or, if they fail to agree, by arbitration.

II. Definitions:

(a) Insured. The unqualified word 'insured' means

(1) the named insured and, while residents of the same household, his spouse and the relatives of either;

(2) any other person while occupying

(i) an automobile owned by the named insured * * *

III. Uninsured Automobile. * * *

* * * the term 'uninsured automobile' shall not include

(i) an automobile owned by the named insured or spouse;

* * *"

The language of the endorsement pursuant to authority of §167, subd. 2-a of the *Insurance Law of New York,* was propounded by the Directors of the Motor Vehicle Indemnification Corporation and approved by the Superintendent of Insurance of the State of New York. (*Matter of Napolitano* [*MVAIC*], 21 N. Y. 2d 281, 286.)

On or about September 27, 1966, petitioner received notice that its assured, Coleman, had been involved in an accident on March 5, 1966 (7). An investigation followed which resulted in petitioner's formal disclaimer of coverage under the policy on December 7, 1966 (8; Ex. "E").

On December 21, 1966, respondents directed a claim to the Motor Vehicle Accident Indemnification Corporation, stating injuries purportedly arising out of the aforesaid accident and indicating that they had been passengers in the Coleman vehicle (8).

On January 25, 1967, respondents served upon petitioner a Demand for Arbitration under the aforesaid "New York Automobile Accident Indemnification Endorsement" (9). Thereupon, petitioner brought a special proceeding in the Supreme Court of the State of New York, County of New York, seeking to vacate the demand and to perpetually stay the arbitration on the ground that there was neither statutory nor contractual basis for a submission to arbitration. It was argued that the disclaimer severed any contractual relationship of petitioner to the accident at bar.

Respondents, in opposition, contended that their Demand was prompted by the suggestion of the Motor Vehicle Accident Indemnification Corporation which had classified the matter as an "insured person case" requiring a proceeding directly against the insured under the aforesaid endorsement (27, 28).

Petitioner, in reply, noted that the most recent compelling decisions in New York indicated that the disclaimer operated to affect all parts of the policy of insurance and that the plain language of the endorsement specifically excluded respondents from coverage (43, 44).

Special Term of the Supreme Court of the State of New York, County of New York, found respondents to be "insured persons" within the meaning of Article 17-a of the *Insurance Law of the State of New York* and dismissed the petition without making any comment upon the exclusionary language of the endorsement (45).

On appeal to the Appellate Division of the Supreme Court, First Judicial Department, it was urged, *inter alia,* that the disclaimer affected all parts of the policy, includ-

ing the endorsement, and that the clear and unambiguous language of the endorsement specifically excluded coverage to the respondents. The lower court was unanimously affirmed, without opinion.

Petitioner thereupon timely moved in said Appellate Division for leave to appeal to the Court of Appeals of the State of New York from the order of unanimous affirmance, contending that the matter was one of first impression, that the clear and unambiguous language of the endorsement excluded coverage to respondents so that they could not effectively have demanded arbitration thereunder and that the importance of the question affected the insurance industry of the State. Permission was granted.

In the Court of Appeals, petitioner argued in similar fashion as in the Appellate Division. In a unanimous decision, the Court affirmed the Appellate Division, and opined that although the exclusionary language of the endorsement was clear, that "negatively stated exclusionary language should not be held to encompass an automobile owned by a named insured where a disclaimer of liability for a particular accident has been interposed".

The ground of the decision of the Court of Appeals was an unexpected surprise, especially where, in prior matters, that court held that "clear and unambiguous 'terms of insurance contracts' are to be understood in their plain, ordinary and popular sense" (*Auerbach* v. *Maryland Casualty Co.*, 236 N. Y. 247, 252); that compelling "language contained in the sta lard uninsured motorist endorsement * * *—which had the approval of the Superintendent of Insurance—" would require an act of the Legislature to eliminate any "inequity resulting to the injured person" (*Matter of Napolitano* [*MVAIC*], 21 N. Y. 2d 281, at p. 286 [concurring opinion of Fuld, C. J.]); that "a court may not, under the guise of interpretation,

make a new contract for the parties or change the words of a written contract * * * " (*Rodolitz* v. *Neptune Paper Products, Inc.*, 21 N. Y. 2d 383, 386); and that a "court is not at liberty to inject a clause into" an insurance policy (*Taylor* v. *United States Cas. Co.*, 269 N. Y. 360). Moreover, the decision of the Court of Appeals could not have been expected in the light of decisions of the Supreme Court of the United States which have criticized the process of "judicial legislation" (*United States* v. *Carolene Products Co.*, 304 U. S. 144, 154; *Iselin* v. *United States*, 270 U. S. 245, 251), no matter how desirous service to beneficent ends might be (*Carter* v. *Carter Coal Co.*, 298 U. S. 239, 291).

Prior to the decision of the Court of Appeals, it was impossible to anticipate a federal question, especially when the most recent precedents in New York (by lower courts) followed the language of the endorsement to exclude coverage thereunder. Therefore, by timely application for reargument, the federal question was first raised when petitioner argued that the Court of Appeals violated Article 1, §10, clause 1 of the *Constitution of the United States*, through judicial legislation and interpretation which injected a new provision into the said endorsement, thereby impairing petitioner's obligations under its policy of insurance.

Argument Relied Upon for the Allowance of the Writ

Insurance Law of New York, §167, subd. 2-a, which enabled the New York Accident Indemnification Endorsement, directs that such endorsement shall be a part of all automobile liability insurance policies issued in the state and directs, further, that the endorsement shall provide payment to an insured:

> " * * * as defined in such provision, subject to the terms and conditions set forth therein to be pre-

> scribed by the board of directors of the Motor Vehicle Indemnification Corporation and approved by the superintendent * * *."

The endorsement at bar was prescribed for and accepted by petitioner in reliance upon the aforesaid legislation, and, thereby, all parties concerned were bound by the obligations as defined thereunder.

Although the statute left it to the board of directors of the Motor Vehicle Indemnification Corporation to prescribe the terms and conditions of liability under the endorsement [and of the exclusions contained therein], the Court of Appeals below determined that another statute (Article 17-A of the *Insurance Law of the State of New York*, §601, subd. i) operated to limit the authority of the board of directors and of the Superintendent of Insurance in their duties.

Section 167, subd. 2-a, however, left the definition of "insured" to the framers of the endorsement and made that definition *subject* to the terms and conditions set forth therein. Section 601, subd. i, provides:

> " 'Insured' means a person defined as an insured under the coverage required by subsection two-a of section one hundred sixty-seven."

Instead of the framers' powers controlling the result below, to which powers §601, subd. 1 and the remainder of Article 17-A of said *Insurance Law* were subservient, the Court of Appeals reversed the situation and narrowed the authority of the framers by reference to such subservient legislation.

Consequently, it is petitioner's position that the obligation of the contract between itself and its assureds was created and fixed pursuant to said §167, subd. 2-a, and that, to the extent that a portion of Article 17-A of the *Insurance*

Law was applied to affect such obligation, the court below upheld a statute of New York to impair an obligation of contract in violation of Article 1, §10, clause 10 of the *Constitution of the United States.*

From another angle, it can be said that the court below construed the provisions of §167, subd. 2-a as though it contained a prohibition against the exclusion relied upon by petitioner below in support of its appeals. The language of the exclusion was not declared ambiguous by the Court of Appeals. In fact, that court found the conclusion clearly, but negatively, stated. To reach its desired opinion, therefore, the court denied the effect of the exclusion, disregarded its plain and simple language and, actually, ignored its existence. In such fashion the court below undertook to "legislate" by judicial process concerning an endorsement which it had once acknowledged could not be "cleaned up" excepting by an act of the Legislature. (*Matter of Napolitano* [*MVAIC*], *supra.*) It presumed to do what the Legislature could not do by constitutional means for, subsequent legislation could not validly impair the obligations of contracts already vested under existing statute thereby to be amended. [Under the guise of interpretation, however the Court of Appeals has "reached back" to affect all contracts written under the current enactment of §167, subd. 2-a.]

If it is the position of the Court of Appeals that it could legislate judicially, it is submitted that the source of its power (*Constitution of the State of New York,* Article 6, §3) severely limits its jurisdiction to review of questions of law. If it could be argued that the power to impair an obligation of a contract through judicial legislation flows from the New York State Constitution, then the constitution itself would be violative of the aforesaid provisions of the *United States Constitution.*

It is submitted that for the foregoing reasons, by reason of the authority of the *Constitution of the United States* and by reason of the prior decisions of this court cited in this petition, that the decision of the Court of Appeals sought to be reviewed hereby has been decided in a way probably not in accord with applicable decisions of this court.

The question sought to be reviewed by this petition is of major importance in the State of New York. One need not cite statistics to demonstrate that millions of policies are in effect in New York State having appended thereto the New York Accident Indemnification Endorsement. In every instance, the insurers are required by statute to contract in the language of the endorsement prescribed thereunder. The opinion of the Court of Appeals bespoke the novelty of the matter before it and its first impression determination has had a far reaching effect. It operates to abridge the practical effect of an insurer's disclaimer of liability for a breach of policy conditions in instances where the fact pattern concerns a one car accident. In such cases, the company is now liable to the injured passenger under the aforesaid endorsement even though its language plainly excludes him from coverage. The inequity of the "forced" construction and of the impairment of the insurer's obligation under its contract is even more shocking when it is considered that the statute makes a safe haven for the injured passenger. Under §601, subd. b of the *Insurance Law of the State of New York*, the passenger could receive the same compensation through a claim against the Motor Vehicle Accident Indemnification Corporation, he being classified under such statute as a "qualified person". The decision sought to be reviewed has now revived dormant claims whereby passengers understood themselves to be precluded from proceeding

under the said endorsement once a disclaimer had been asserted against the named assured.

As the state of affairs now exists in New York, insurers are faced with expenses of many millions of dollars for the resistance of claims brought by passengers under the endorsements and with the further requirement of tieing up millions for reserves against claims never heretofore anticipated.

CONCLUSION

The petition should be granted and the decision of the Court of Appeals reviewed.

Respectfully submitted,

ARNOLD DAVIS,
Attorney for Petitioner.

APPENDIX "A"

Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES

Article I, Section 10 (clause 1). No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

INSURANCE LAW OF THE STATE OF NEW YORK

§167. Liability insurance; standard provisions; right of injured person

* * *

2-a. No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any natural person arising out of the ownership, maintenance and use of a motor vehicle by the insured shall be issued or delivered by any authorized insurer upon any motor vehicle then principally garaged or principally used in this state unless it contains a provision whereby the insurer agrees that it will pay to the insured, as defined in such provision, subject to the terms and conditions set forth therein to be prescribed by the board of directors of the Motor Vehicle Indemnification Corporation and approved by the superintendent, all sums, not exceeding a maximum amount or limit of ten thousand dollars exclusive of interest and costs, on account of injury to, or death of, one person, in any one accident, and the maximum amount or limit, subject to such limit for any one person so injured or killed, of twenty thousand dollars, exclusive of interest or costs, on account of injury to, or death of, more than one person in any one accident, which the insured or his legal representative shall be entitled to recover as

damages from an owner or operator of an uninsured motor vehicle, unidentified motor vehicle which leaves the scene of an accident, a motor vehicle registered in this state as to which at the time of the accident there was not in effect a policy of liability insurance, a stolen vehicle, a motor vehicle operated without permission of the owner, an insured motor vehicle where the insurer disclaims liability or denies coverage or an unregistered vehicle because of bodily injury, sickness or disease, including death resulting therefrom, sustained by the insured, caused by accident occurring in this state and arising out of the ownership, maintenance or use of such motor vehicle. Any such policy which does not contain the aforesaid provision shall be construed as if such condition were embodied therein.

• • •

ARTICLE 17-A—MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION LAW

§600. Short title and declaration of purpose

(1) This act shall be known and may be cited as the "motor vehicle accident indemnification corporation law".

(2) Declaration of purpose. The legislature finds and declares that the motor vehicle financial security act as enacted in nineteen hundred fifty-six, which requires the owner of a motor vehicle to furnish proof of financial security as a condition to registration, fails to accomplish its full purpose of securing to innocent victims of motor vehicle accidents recompense for the injury and financial loss inflicted upon them, in that the act makes no provision for the payment of loss on account of injury to or death of persons who, through no fault of their own, were involved in motor vehicle accidents caused by (1) uninsured

motor vehicles registered in a state other than New York, (2) unidentified motor vehicles which leave the scene of the accident, (3) motor vehicles registered in this state as to which at the time of the accident there was not in effect a policy of liability insurance, (4) stolen motor vehicles, (5) motor vehicles operated without the permission of the owner, (6) insured motor vehicles where the insurer disclaims liability or denies coverage and (7) unregistered motor vehicles. The legislature determines that it is a matter of grave concern that such innocent victims are not recompensed for the injury and financial loss inflicted upon them and that the public interest can best be served by closing such gaps in the motor vehicle financial security act through the incorporation and operation of the motor vehicle accident indemnification corporation. Added L. 1958, c. 759, §2, eff. Jan. 1, 1959.

§601. Definitions

As used in this article: * * *.

b. "Qualified person" means (1) a resident of this state, other than an insured or the owner of an uninsured motor vehicle and his spouse when a passenger in such vehicle, or his legal representative, or (2) a resident of another state, territory or federal district of the United States or province of the Dominion of Canada, or foreign country, in which recourse is afforded, to residents of this state, of substantially similar character to that provided for by this article, or his legal representative.

* * *

i. "Insured" means a person defined as an insured under the coverage by subsection two-a of section one hundred sixty-seven.

* * *

Statutory Provisions Involved

§608. Notice of intention to file claim

The protection provided by the corporation on account of motor vehicle accidents caused by financially irresponsible motorists shall be available to:

* * *

(c) Any qualified person having a cause or causes of action because of death or bodily injury, arising out of a motor vehicle accident occurring within this state, who shall file with the corporation an affidavit as a condition precedent to the right thereafter to apply for payment from the corporation, stating that (1) he has a cause or causes of action arising out of such accident for damages and setting forth the facts in support thereof, (2) the insurer or insurers of the person or persons liable or alleged to be liable for his injury or loss have disclaimed liability or denied coverage because of some act or omission of the person or persons liable or alleged to be liable, and (3) he intends to make a claim thereon for such damages. Such affidavit shall be filed within ten days of receipt of notice by such affiant of such disclaimer or denial of coverage.

* * *

APPENDIX "B"

Opinions Below

OPINION OF SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, BY MR. JUSTICE SAYPOL

(New York Law Journal, July 7, 1967)

Application by the petitioner for an order vacating the respondent's demand for arbitration is denied and the petition is dismissed. On March 15, 1966, respondents were injured while passengers in an automobile owned and operated by Dennis Coleman, petitioner's insured. By letter dated December 7, 1966, the petitioner notified its insured and the respondents that it was disclaiming coverage because of its insured's failure to give notice of the accident and co-operate in its investigation. It cannot be questioned that at the time of the accident the respondents were insured persons as defined by article 17a of the Insurance Law. Petitioner's argument that by reason of its disclaimer respondents' status changed from insured to qualified persons is not persuasive (see In re M. V. A. I. C. [Goldman], 33 Misc. 2d 703; In re M. V. A. I. C. [Marshal], 39 Misc. 2d 142, aff'd 21 A. D. 2d 978; and In re Garcia [M. V. A. I. C.], 41 Misc. 2d 858). As insured persons, the respondents are entitled to join the petitioner in arbitration of this claim pursuant to the terms of item 1 of the New York Automobile Accident Indemnification Endorsement affixed to the policy involved here. Section 605 of the Insurance Law, as amended by Chapter 322 of the Laws of 1965 has the effect of requiring the insurer itself to assume all obligations formerly assumed by M. V. A. I. C. regarding claims of insured persons involving insurance policies issued or renewed after June 30,

1965 (cf. Matter of Kuriga v. Atlas Assurance Co., Ltd., et al., 52 Misc. 2d 275). The effective date of the subject policy was January 3, 1966. Settle order.

OPINION OF COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Arbitration between KNICKERBOCKER INSURANCE COMPANY, Appellant, and PATRICIA FAISON et al., Respondents.

Argued June 4, 1968; decided July 2, 1968.

APPEAL, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of said court, entered November 30, 1967, which unanimously affirmed an order of the Supreme Court at Special Term (IRVING H. SAYPOL, J.), entered in New York County, (1) denying a motion by petitioner for an order vacating respondents' demand for arbitration and (2) dismissing the petition.

JASEN, J. On March 5, 1966 respondents were injured while passengers in an automobile owned and operated by petitioner's insured. In December, 1966 petitioner disclaimed liability because of its insured's failure to give notice of the accident and co-operate in its investigation. The validity of that disclaimer is not in issue here. Thereafter, respondents served a notice of claim and demand for arbitration on both the petitioner and the Motor Vehicle Accident Indemnification Corporation (MVAIC) under provisions of the "New York Automobile Accident Indemnification Endorsement" of the insured's policy, which provides, *inter alia*:

"I. Damages for Bodily Injury Caused by Uninsured Automobiles: The company will pay all sums which the insured * * * shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury * * * sustained by the insured, caused by accident arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this endorsement, determination as to whether the insured * * * is legally entitled to recover such damages * * * shall be made by agreement between the insured * * * and the company or, if they fail to agree, by arbitration.

II. Definitions:

(a) Insured. The unqualified word 'insured' means

(1) The named insured and, while residents of the same household, his spouse and the relatives of either;

(2) any other person while occupying

(i) an automobile owned by the named insured * * *

(b) Uninsured Automobile. * * *

* * * the term 'uninsured automobile' shall not include:

(i) an automobile owned by the named insured or spouse".

MVAIC opposed respondents' claim and in a separate proceeding not before this court obtained a stay of arbitration.

In the course of denying petitioner's application for an order staying arbitration, Special Term held that respondents unquestionably were insured persons at the time of

the accident and that petitioner's disclaimer could not operate to change their status from insured to qualified persons.[1] The court, noting that the effective date of the policy was January 3, 1966, reasoned that respondents were entitled to join petitioner in arbitration pursuant to the Automobile Accident Indemnification Endorsement inasmuch as section 605 of the Insurance Law, as amended by chapter 322 of the Laws of 1965, required the insurer to assume all obligations formerly assumed by MVAIC involving accidents occurring after June 30, 1965, where insurance policies were issued or renewed after that time.[2]

Petitioner's argument is grounded on the contention that the New York Automobile Accident Indemnification Endorsement should be considered as part and parcel of the main policy and, therefore, a disclaimer should affect the entire policy and not merely the main liability portion. It is petitioner's position that the endorsement was never intended to constitute an additional policy of insurance; thus, the endorsement should not operate to revive coverage previously disclaimed.

According to petitioner, although respondents might have been "insured persons" at the time of the accident, the disclaimer operated to make them "qualified persons" *ab initio*. It further argues that, even if respondents are to be considered "insured persons" despite the disclaimer,

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1. Section 601 (subd. b) of the Insurance Law provides that a "'Qualified person' means (1) a resident of this state, other than an insured or the owner of an uninsured motor vehicle and his spouse when a passenger in such vehicle".

2. Although subdivision (a) of section 605 of the Insurance Law discontinues MVAIC's obligation to an insurer's insured after June 30, 1965, subdivision (c) of section 605 requires MVAIC to continue to provide protection to qualified persons.

they are precluded from proceeding against petitioner by reason of the exclusionary language in the endorsement which by definition excludes a vehicle owned by the named insured from the category of uninsured automobiles.

This is a matter of first impression in this court. The decisions below have often been conflicting and irreconcilable. (Compare *Matter of Murphy* [*Criterion Ins. Co.*], 57 Misc 2d 52, and *O'Connell* v. *State-Wide Ins. Co.*, 57 Misc 2d 50, with *Matter of Shumate* [*MVAIC*], 50 Misc 2d 31, and *Matter of Coppola* [*MVAIC*], 53 Misc 2d 48.)

Effective July 1, 1965 insurers were required to provide the coverage and pay claims arising out of accidents formerly administered by the MVAIC. (L. 1965, ch. 322.) Under the provisions of the amended statute, the insurer undertook the duties and liabilities formerly assumed by MVAIC and similarly collected the additional premium for the endorsement. (Insurance Law, §605; §167, subd. 2-a.) It has been recognized that the purpose of the statute is to provide compensation to the extent that claims would be recognized and claimants compensated as if the owner or driver of the vehicle causing the injury were insured. (*Matter of Nagle*, [*MVAIC*], 22 N Y 2d 165; *McCarthy* v. *MVAIC*, 16 A D 2d 35, affd. 12 N Y 2d 922.) It seems inconsistent with this purpose that an insured person could be deprived of this coverage by some future act of a named insured or his insurer.

Thus, the endorsement required by section 167 (subd. 2-a) of the Insurance Law should be considered to exist independently from the standard policy to which it is annexed and should remain viable even though liability under the main policy has been disclaimed by the insurer. (*Matter of MVAIC* [*Marshall*], 39 Misc 2d 142, affd. 21 A D 2d 978.)

Opinions Below

The Legislature in enacting article 17-A of the Insurance Law set up the mutually exclusive categories of "Insured" persons and "Qualified person[s]". (Insurance Law, §601, subds. b, i; *Matter of Edwards* v. *MVAIC*, 25 A D 2d 420 [1st Dept., 1966].) A future disclaimer as to the main portion of the policy cannot operate to change an "Insured" person to a "Qualified person". Inasmuch as respondents are placed squarely within the category of "Insured" persons as defined in the Automobile Accident Indemnification Endorsement, the language purporting to remove an automobile owned by the insured from the category of uninsured automobile should be given a construction most favorable to the insured and one which results in coverage, rather than denial of coverage. (*Murphy* v. *Criterion Ins. Co., supra; Matter of Garcia* [*MVAIC*], 41 Misc 2d 858.) Thus, the negatively stated exclusionary language should not be held to encompass an automobile owned by the named insured where a disclaimer or liability for a particular accident has been interposed.

The order appealed from should be affirmed, with costs.

Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Keating and Breitel concur.

Order affirmed.

Order of Court of Appeals Affirming Order of Affirmance of Appellate Division

COURT OF APPEALS

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of July, in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

Witness,

The Hon. Stanley H. Fuld,
Chief Judge, Presiding.

Raymond J. Cannon,
Clerk.

Remittitur July 2, 1968.

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1. No. 178. 68

In the Matter of the Application of

Knickerbocker Insurance Company,

Appellant,

for an Order staying the Arbitration Commenced by Patricia Faison & ano.,

Respondents.

Be it remembered, That on the 6th day of April in the year of our Lord one thousand nine hundred and sixty-

Order of Court of Appeals Affirming Order of Affirmance of Appellate Division

eight, Knickerbocker Insurance Company, the appellant—in this cause, came here unto the Court of Appeals, by Arnold Davis, its attorney—, and filed in the said Court a return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department.

And Patricia Faison & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Fuchsberg & Fuchsberg, their attorneys. Which said return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Arnold Davis, of counsel for the appellant—, and by Mr. Joseph J. Varon, of counsel for the respondents, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the return thereto aforesaid as the judgment of the Court of Appeals, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in

Order of Court of Appeals Affirming Order of Affirmance of Appellate Division

such case made and provided, to be enforced according to law, and which record now remains in the Supreme Court, before the Justices thereof, &c.

s/ RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office
Albany, July 2, 1968.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ RAYMOND J. CANNON
Clerk.

[SEAL.]

Order of Court of Appeals Denying Reargument

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of October A. D. 1968.

Present,

HON. STANLEY H. FULD,
Chief Judge, presiding.

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1 Mo. No. 958

In the Matter of the Application of

KNICKERBOCKER INSURANCE COMPANY,
Appellant,

For an order staying the Arbitration commenced by PATRICIA FAISON and CAROLYN E. RAINEY,
Respondents.

A motion for a reargument of the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy

RAYMOND J. CANNON
Clerk

[SEAL.]

SUPREME COURT, U. S.

DEC 18 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 788

In the Matter of the Application of

KNICKERBOCKER INSURANCE COMPANY,

Petitioner,

for an order Staying the Arbitration Commenced by PATRICIA FAISON and CAROLYN E. RAINEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

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KNICKERBOCKER INSURANCE COMPANY,

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for an order Staying the Arbitration Commenced by PATRICIA FAISON and CAROLYN E. RAINEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

Jurisdiction

The main issues on the merits involve the interpretation of a New York Automobile Accident Indemnification Endorsement on a policy of liability insurance issued by the petitioner, and whether said endorsement exists independently and apart from insurance policy to which it is annexed.

Petitioner, pursuant to Rule 19 of this Court, has failed to demonstrate that a substantial federal or constitutional question is at issue, or that there is conflict with any other state law, or with a decision of another Court of Appeals on the same matter.

In fact, the petitioner failed to raise any such question in the Supreme Court of the State of New York, in the Appellate Division, First Department, of the State of New York, or in the Court of Appeals of the State of New York, until it moved for leave to re-argue the decision and order of the Court of Appeals, which affirmed the lower court decisions and orders.

In *Ellis* v. *Dixon,* N. Y. 1955, 75 S. Ct. 840, 349 U. S. 458, the court ruled that where questions were not raised in state court proceedings, certiorari would not be permitted.

Examination of the opinion in the Court of Appeals, pages 18-22 of Petitioner's Appendix "B", the Remittur dated July 2, 1968, pages 23-25 of petition, the order of the Court of Appeals, dated October 10, 1968, page 26 of Petition, clearly reveals absence of any federal or constitutional question. Petitioner has failed to move to amend the remittur in the state court to show a constitutional or federal question, and accordingly under the decision of this court in *Ungar* v. *Sarafite,* 376 U. S. 575, 84 S. Ct. 841, certiorari should not be permitted.

Respondents' Argument

Petitioner claims that the Insurance Law of the State of New York, Article 17A, has impaired its obligation of contract under the New York Indemnification Endorsement because of certain exclusionary language therein.

Judge Matthew Jasen of the Court of Appeals, page 21 of Petition answers this contention by stating that in this matter of first impression, the decisions in the courts be-

low have been conflicting and irreconcilable, thus, indicating ambiguity of language and doubt of meaning, and not clear unambiguous language as contended by the petitioner, and that said endorsement required by state law be considered to exist independently from the standard policy and that it remains viable even though liability under the main liability policy has been disclaimed. This is the crux of the matter and the court unanimously agreed that said endorsement was to be construed as a separate instrument.

Actually the court for the first time analyzed the endorsement, reconciled provisions that were contradictory and/or ambiguous, and interpreted in very definite and simple terms the obligations under said endorsement. This does not mean that obligations under said contract were impaired. In this ruling the court followed the age old principal of construing said contract in a manner most favorable to the insured and one which results in coverage, rather than a denial of coverage as previously enunciated by said court in *Murphy* v. *Criterion Ins. Co.*, 57 Misc. 2d 52, and *Matter of Garcia (MVAIC)*, 41 Misc. 2nd 858.

In addition, the contention of judicial legislation is without merit as it has long been decided that the provision of Section 10, of Article I, of the Federal Constitution, protecting the obligation of contracts against State action is directed only against impairment by legislation and not by judgment of courts, as in this proceeding.

Barrows v. *Jackson*, 349 U. S. 249, 260, 73 Sup. Ct. 1031, 1037 (1953).

Tidal Oil Co. v. *Flanagan*, 264 U. S. 444, 451, 44 Sup. Ct. 197, 198.

CONCLUSION

Petition for Writ of Certiorari to the Court of Appeals of the State of New York should be denied on jurisdictional grounds and on the merits.

Respectfully submitted,

JACOB D. FUCHSBERG,
Attorney for Respondents.

JOSEPH J. VARON,
of Counsel.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1968

No. 788

In the Matter of the Application of

KNICKERBOCKER INSURANCE COMPANY,

Petitioner,

for an order Staying the Arbitration Commenced by PATRICIA FAISON and CAROLYN E. RAINEY,

Respondents.

MOTION OF MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND *AMICUS CURIAE* BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

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No.

In the Matter of the Application of

KNICKERBOCKER INSURANCE COMPANY,

Petitioner,

for an order Staying the Arbitration Commenced by PATRICIA FAISON and CAROLYN E. RAINEY,

Respondents.

MOTION OF MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION, a public corporation, created, organized and existing, pursuant to the Insurance Law of the State of New York, respectfully moves this Court for leave to file the accompanying brief in this case as *Amicus Curiae*. The consent of the attorney for the respondents herein, has been obtained, but the attorney for the petitioner has refused to consent to the filing of a brief by Motor Vehicle Accident Indemnification Corporation (hereinafter referred to as "MVAIC") as *Amicus Curiae*.

MVAIC has an interest in this case, in that, pursuant to Article 17-A of the Insurance Law of the State of New York, if, in this and all similar cases, the petitioner insurance company is relieved of its contractual liability to the respondents, MVAIC will be cast in liability to them.

Motion of Motor Vehicle Accident Indemnification Corporation for Leave to File Brief as Amicus Curiae in Opposition to Petition for Writ of Certiorari

None of the alleged constitutional points raised by the petitioner herein were mentioned in any of the three Courts of the State of New York which have heard and decided this proceeding. The petition herein says nothing concerning the jurisdictional necessity for preserving a constitutional point in the lower courts. The opinion of the Court of Appeals of New York (Page 17 et seq. of the petition) makes no mention of any constitution, United States, New York or otherwise, nor does the order of that Court (Pages 23 et seq. of the petition).

Additionally, the petition does not deal with the alleged substantive issue involved, i.e., the impairment of a contract right, except in the most general terms.

We have no way of knowing whether any of these points will be discussed by the respondents. Obviously, through no fault of the respondents, these points were not previously made by them.

We should note that MVAIC was previously granted leave to appear, *Amicus Curiae,* both in the Appellate Division of the Supreme Court of the State of New York for the First Department and in the Court of Appeals in New York.

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IN THE

Supreme Court of the United States

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No.

In the Matter of the Application of

KNICKERBOCKER INSURANCE COMPANY,

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Respondents.

BRIEF, *AMICUS CURIAE,* OF MVAIC IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

This brief is submitted by Motor Vehicle Accident Indemnification Corporation, (hereinafter referred to as "MVAIC"), concurrently with a motion to this Court for leave to file such a brief. It is submitted in opposition to the Petition for a Writ of Certiorari.

Jurisdiction

This Court is without jurisdiction. The alleged constitutional issue is raised for the first time in this Court. There is not one word, either in the opinion of the New York Court of Appeals, or in its order, or in the order on reargument, relating to anything in the Constitution of

the United States, much less the part thereof relied on by the petitioner.

In *Ungar* v. *Sarafite,* 376 US 575, 84 Sup. Ct. 841 (1964), a case originating in the New York Courts, this Court held (376 US at 582, 583, 84 Sup. Ct. at 846) that the remittitur of the New York Court of Appeals is determinative in this Court as to the Constitutional issues raised and necessarily passed upon in the State Courts, citing *Bailey* v. *Anderson,* 326 US 203, 66 Sup. Ct. 66. As stated above, the remittitur is completely barren of any such statements.

Asbury Hospital v. *Cass County, North Dakota,* 326 US 207, 213, 66 Sup. Ct. 64 (1945) is to the same effect, as are a host of other cases, far too numerous to cite. In any event, the rule mentioned herein is one of the most familiar known to the law.

Petitioner moved for re-argument in the Court of Appeals, but quite obviously did not move to amend the remittitur so as to present, in some fashion or other, a Constitutional question (petition, p. 26). In its order denying re-argument, the Court of Appeals of New York said nothing whatever concerning any application by petitioner along such lines (petition, p. 26).

Petitioner's attempt to explain away its total failure to raise any constitutional question in the State Courts may charitably be described as a sham. On pages 6 and 7 of the petition, petitioner blandly states that the ground of decision of the Court of Appeals "was an unexpected surprise". The opinion of the Court of Appeals is not substantially different from that of Special Term (petition, p. 17). Even if it were, there was no particular reason why petitioner should have been surprised. On the face of it, the opinion of the Court of Appeals merely construes, in a manner adverse to petitioner's position, a standard New York liability insurance endorsement.

Petitioner states (p. 7):

> "Prior to the decision of the Court of Appeals, it was impossible to anticipate a federal question, especially when the most recent precedents in New York (by lower courts) followed the language of the endorsement to include coverage thereunder."

The opinion of the Court of Appeals states (petition, p. 21):

> "The decisions below have often been conflicting and irreconcilable."

Four conflicting New York lower court decisions follow. It is quite obvious that petitioner has misstated the law in New York, prior to the instant decision, and that it had no reason whatever to be surprised by the decision of the Court of Appeals, in view of the existing conflict of decision. Moreover, if, as petitioner seems to state, any adverse interpretation of the contract in question is unconstitutional, petitioner could easily have made that point in the New York Courts.

For the reasons stated, it is respectfully submitted that this Court has no jurisdiction, and the petition should be denied on those grounds alone.

No Constitutional Question is Involved

Petitioner invokes Article I, Section 10, Clause 1 of the Constitution of the United States, which states:

> "No State shall *** pass any *** Law impairing the Obligation of Contract ***."

There is no claim that the Legislature of the State of New York enacted any such proscribed legislation. Rather, the claim is that the Courts of New York have interpreted a contract in a manner which impairs petitioner's rights thereunder. That is not sufficient to bring the case within any alleged Constitutional proscription.

In *Barrows* v. *Jackson,* 346 U.S. 249, 260, 73 Sup. Ct. 1031, 1037 (1953), this Court, citing *Tidal Oil Co.* v. *Flanagan,* 263 US 444, 451, 44 Sup. Ct. 197, 198, stated:

> "It has been settled by a long line of decisions, that the provision of Section 10, of Article I, of the Federal Constitution, protecting the obligation of Contracts against State action, is directed only against impairment by legislation and not by judgment of Courts."

Thus, there simply is no Constitutional question to review.

In any Event, There was no Impairment of Contractual Obligations

If the instant opinion of the Court of Appeals constitutes the impairment of contractual obligation, in the Constitutional sense, then every unsuccessful litigant in an action, the point of which is to construe a contract, will be able to have his case heard before this Court. This is a manifest absurdity.

The instant decision is no more nor no less than the construction by the highest court of New York of an insurance policy endorsement, the terms of which are mandated by a New York statute, subdivision 2-a of Section 167 of the Insurance Law of the State of New York, the text of which is set forth at pages 13 and 14 of the petition. It is peculiarly the function of the New York Court of Appeals to interpret, definitively, such an endorsement.

CONCLUSION

The Petition Should Be Dismissed.

Respectfully submitted,

FRIEDLANDER, GAINES, RUTTENBERG & GOETZ
Attorneys for MVAIC
Amicus Curiae

SUPREME COURT, U. S.

DEC 26 1968

JOHN F. DAVIS, CLERK

IN THE

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OCTOBER TERM, 1968

No. 788

In the Matter of the Application

of

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Petitioner.

for an order Staying the Arbitration Commenced by PATRICIA FAISON and CAROLYN E. RAINEY,

Respondents.

REPLY BRIEF OF PETITIONER

The petition in this court (pp. 6 and 7) reveals that the Court of Appeals handed down a decision prior to which it could not have been anticipated that a federal question would arise. It is contended that in no prior decision was a statute of the State of New York (*Article 17-A of the Insurance Law*) applied to abridge the authority of §167, subd. 2 of the *Insurance Law*, under which latter statute the contractual obligation at bar was created. Consequently, it was only by application for reargument that the federal question could be raised for the first time.

The situation presented in the petition is not at all novel to this court and the same has been discussed favorably to petitioner's position in the past.

Herndon v. *Georgia*, 295 U. S. 441, 444;

Great Northern R. Co. v. *Sunburst Oil Co.*, 287 U. S. 358, 366-367;
Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313, 320;
Brinkerhoff-Faris Trust Co. v. *Hill*, 281 U. S. 673, 677-678;
Saunders v. *Shaw*, 244 U. S. 317, 320.

A concise discussion of the timely raising of the federal question at bar is also to be found in Stern and Gressman, *Supreme Court Practice*, 3d Ed., p. 99.

Under the foregoing authorities, it is submitted that it is immaterial to the granting of the instant petition that the Court of Appeals has not certified its consideration of a constitutional question upon the motion for reargument.

Respondent's claim at page "3" of their opposing brief that the matter at bar concerns only a question of interpretation and that, at most, the decision below was a *judicial* impairment of an obligation of contract. It is submitted, however, the petition demonstrates that the State of New York has enacted Article 17-A of the *Insurance Law* which has been applied in a manner by the Court of Appeals so as to impair the obligation created pursuant to the authority of §167-subd. 2 of that Law. It is submitted that in such manner did the State of New York pass a law impairing an obligation of contract to the injury of the petitioner.

The petition should be granted.

Respectfully submitted,

ARNOLD DAVIS,
Attorney for Petitioner.